Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Personal Communications Industry Association's	)	
Broadband Personal Communications Services	)	
Alliance's Petition for Forbearance For Broadband	)	
Personal Communications Services	)	
	)	
Biennial Regulatory Review - Elimination	)	
or Streamlining of Unnecessary and Obsolete	)	
CMRS Regulations	)	
	)	
Forbearance from Applying Provisions of the	)	WT Docket No. 98-100
Communications Act to Wireless	)	
Telecommunications Carriers	)	

THE BROADBAND PERSONAL COMMUNICATIONS SERVICES ALLIANCE OF THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION PETITION FOR RECONSIDERATION

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EXECUTIVE SUMMARY

PCIA seeks reconsideration of the Commission's failure to forbear from applying mandatory resale requirements to broadband Commercial Mobile Radio Service ("CMRS") operators. By any reasonable measure, CMRS is the most robustly competitive segment of the U.S. telecommunications marketplace. In every market in the country, at least nine companies have (or soon will have) licenses and strong economic incentives to serve all segments of the community. In every market in the country, prices for services are plummeting. In every market in the country, competition is extending its beneficial reach to all consumers — individuals as well as businesses.

With this track record of success, CMRS would seemingly have been the optimum "poster child" for deregulation under the Commission's newly expanded forbearance authority. In the Telecommunications Act of 1996 ("1996 Act"), Congress entrusted and empowered the Commission with the authority and obligation to forbear from "applying its rules or provisions of the Act" where competitive forces supplant the need for government intrusions. In that spirit, PCIA carefully identified and documented in a forbearance petition the areas where regulation impedes rather than promotes competition.

In its order responding to the PCIA forbearance petition, the Commission has essentially pursued a path of "non-forbearance." The few action items (elimination of *pro forma* transfer and assignment applications and discretionary international tariffs) were aptly described as "baby steps" down the path of deregulation. In filing this petition for reconsideration on the resale requirements, PCIA is renewing its plea for agency recognition that the industry and the law have

changed. Reconsideration is compelled for several overarching reasons. The time has come for the FCC to show that regulators can really be trusted to deregulate.

First, the Commission's order stands Congressional intent on its head. The underpinning of the new Section 10 forbearance authority is that increased marketplace competition removes the *raison d'etre* for monopoly-like regulation of telecommunications companies. The Commission's decision, however, actually cites the increasing competitiveness of the CMRS as industry grounds for preserving regulation. In effect, the order converts the successes of the competitive marketplace into a rationale for retaining rather than removing regulation. Not surprisingly, neither the 1996 Act nor its legislative history can sustain a reading of Section 10 as expanding the Commission's jurisdictional reach or public interest mission.

Second, the order ignores the record concerning CMRS competitiveness (including the Commission's own findings) and introduces findings about resale benefits that have no factual foundation. The record shows that CMRS competition has taken root with enormous benefits for consumers and the public interest. The record does not show that mandatory resale brings benefits to anyone other than industry special interests. In particular, there is no evidence that resale would not flourish in the marketplace absent government compulsion (as it has in the paging marketplace where mandatory resale rules are not imposed) or that the absence of mandatory resale would harm consumers or impinge upon opportunities for small businesses. Here, the agency's predictive judgment is a gross misjudgment.

Third, the order establishes a standard for assessing future forbearance petitions that is a recipe for waste, inefficiency, and procrastination. The approach articulated would require extensive market-specific data under an amorphous and subjective set of criteria. CMRS forbearance petitions would be costly to prepare and potentially swamp the Wireless

Telecommunications Bureau with labor intensive "mini-hearings" for each of the hundreds of CMRS markets. Alternatively, the vagueness of the Commission's standards may elicit only silence from the wireless industry as members conclude that any attempt to seek forbearance will be fruitless.

While PCIA believes that a case has already been made for national forbearance from CMRS resale regulation, the Commission should, at a minimum, embrace a few basic principles to govern its future handling of CMRS forbearance petitions. Specifically, the standard for review should be redefined to allow for simplified showings based upon readily verifiable information. In addition, the Commission should announce a policy of automatically extending forbearance from resale obligations to markets where four CMRS licensees are operational. In such cases, there is no need for an elaborate showing because the basic premise underlying the resale sunset — the buildout of multiple competing broadband systems — has already occurred.

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THE BROADBAND PERSONAL COMMUNICATIONS SERVICES ALLIANCE OF THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION PETITION FOR RECONSIDERATION

The Broadband Personal Communications Services Alliance of the Personal Communications Industry Association ("PCIA") hereby petitions for partial reconsideration of the Commission's *Memorandum Opinion and Order* in the above-captioned proceeding.[1] Specifically, based on the record before it, the Commission should reconsider its decision not to forbear from the mandatory resale requirements[2] currently imposed upon CMRS operators.

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[1] Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-134 (rel. July 2, 1998) ("*Order*"). The *Order* was published in the Federal Register on August 11, 1998, 63 Fed. Reg. 43033. As a result, the deadline for filing petitions for reconsideration is September 10, 1998.

[2] 47 C.F.R. § 20.12(b), which requires that "[e]ach carrier subject to this section must permit unrestricted resale of its service."

Contrary to the Commission's conclusion, forbearance from the resale obligations is *required* under Section 10.[3]

I. INTRODUCTION

On May 22, 1997, PCIA filed its Petition for Forbearance[4] in accordance with Section 10 of the Communications Act of 1934, as amended.[5] The vast majority of commenters agreed with PCIA's description of the competitive market conditions and supported PCIA's request that the Commission move toward a deregulatory environment by eliminating unnecessary regulatory burdens on a broad range of CMRS providers.

In the *Order,* issued on July 2, 1998, the Commission declined to forbear from enforcing the CMRS resale rule.[6] In this petition, PCIA seeks reconsideration of the *Order's* failure to grant forbearance from the CMRS resale requirements. As detailed below, the Commission's refusal to forbear does not comport with the statutory requirements, the facts of the competitive CMRS marketplace, or the public interest.

II. THE *ORDER* IGNORED THE DIRECT LANGUAGE OF SECTION 10 OF THE COMMUNICATIONS ACT AS WELL AS THE LEGISLATIVE INTENT

The Commission's *Order* incorrectly applies the standard of Section 10 of the Communications Act and ignores the underlying legislative purposes in declining to forbear from mandatory CMRS resale requirements. As the Commission has recognized many times before, Congress intended the provisions of the 1996 Telecommunications Act ("1996 Act") "to provide

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3 47 U.S.C. § 160.

4 Broadband Personal Communications Services Alliance of the Personal Communications Industry Association Petition for Forbearance (filed May 22, 1997) ("*Petition for Forbearance*").

5 47 U.S.C. § 160(a)-(c).

6 *Order*, ¶¶ 32-44.

for a pro-competitive, *de-regulatory* national policy framework."[7] Congress based Section 10 on an already existing section of the Communications Act — Section 332. In discussing the Congressional objectives of Section 332, the Commission has found that, "in a competitive market, market forces are generally sufficient to ensure the lawfulness of rate levels, rate structures, and terms and conditions of service."[8]

When it established the Section 10 framework, Congress did not voice any disapproval of the Commission's conclusions under Section 332.[9] Indeed, Section 10 extends Section 332's permissive deregulatory goals to mandate forbearance from "*any* regulation or *any* provision of this chapter" when competition is present and Section 10's provisions are satisfied.[10] Assuming that Congress intended the Commission to narrow its approach to deregulation, especially as applied to CMRS carriers, under a more expansive and mandatory forbearance authority is contrary to logic.

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[7] *Telecommunications Act of 1996*, H.R. Conf. Rep. No. 104-458, at 1 (1996) (emphasis added); *see also Telecommunications Competition and Deregulation Action of 1995*, S. Rep. No. 104-23, at 1 (1995). For Commission statements to this effect, *see, e.g.*, *Report to Congress*, Federal-State Joint Board on Universal Service, CC Docket No. 96-45, FCC 98-67, at ¶ 39 (rel. April 10, 1998); *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 FCC Rcd 6777, 6787-88 (1998).

[8] *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1478 (1994) ("*CMRS Second Report & Order*").

[9] *See* H.R. Conf. Rep. No. 104-458, at 184-85 (1996); S. Rep. No. 104-23, at 50 (1995). In fact, the Commission acknowledges in the *Order* that, "[w]e believe the goals we identified in the *CMRS Second Report and Order* mirror those set for us by Congress in the 1996 Act." *Order*, ¶ 113.

[10] 47 U.S.C. § 160(a) (emphasis added). This provision does not apply to only two sections, Sections 251(c) and 271, until their requirements have been fully implemented. 47 U.S.C.

(Continued . . .)

The *Order*, however, treats Section 10 as if it were an affirmative grant of authority to be used to justify not only retaining existing regulation of the CMRS industry, but to extend additional regulatory burdens. Rather than citing the competitive nature of the CMRS industry as the reason to forbear from resale and other unnecessary regulatory obligations, the *Order* cites the competitive nature of the industry as a reason to continue regulation.[11] Implicit in the Commission's *Order* is a conclusion that, as subscriptions to CMRS offerings increase because of competitive price decreases, consumers need increased regulatory protection from the Commission.

This posture simply disregards the clear statutory language as well as Congress' statements regarding the 1996 Act. For example, when it was considering its telecommunications bill, the Senate found that the provisions of the 1934 Act are a "historical anachronism."[12] Given the current competitive CMRS environment, consumers do not require the Commission to take on the role of an additional consumer protection agency. While Section 10 requires the Commission to ensure that enforcement is not necessary to protect consumers,[13] the Commission must recognize that, in addition to the vast protections afforded consumers in a competitive market, consumers are further safeguarded by state and federal laws and regulations specifically targeted at consumer protection and administered by authorized

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(. . . Continued)
§ 160(d). Section 332, in contrast, covered a more limited category of statutory requirements and only as applied to CMRS operators.

11 *See, e.g., Order,* ¶ 28 (noting that, as CMRS becomes more competitive and begins to serve as a substitute for wireline services, regulation becomes more necessary).

12 S. Rep. No. 104-23, at 2 (1995).

13 47 U.S.C. § 160(a)(2).

agencies with particular expertise. Contrary to the *Order's* effect, Congress sought to craft a law that would lead the Commission toward the act of "reducing regulation and barriers to competition,"[14] not toward the expansion of regulation.

Similarly, Congress set forth a straightforward test and process in Section 10 for telecommunications providers to seek relief from regulatory burdens no longer necessary to serve public interest objectives. Congress in no way suggested the Commission should develop a complex, time-consuming, and resource-consuming mechanism for assessing the appropriateness of forbearance. As described below, however, that is exactly what the *Order* does.[15] For example, the Commission directs petitioners to show that "the costs incurred by carriers to comply with particular provisions outweigh the benefits to the public to be gained in applying them."[16] Complicating the statutory analysis, requiring elaborate cost/benefit analyses, and otherwise raising the burden to petitions will not move the Commission toward "reducing regulation and barriers to competition."[17] Indeed, adding extraneous standards to the forbearance test runs counter to the mandatory forbearance required by Section 10. As Commissioner Powell points out, the *Order's* framework "will perpetuate regulation, institutionalize government

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[14] S. Rep. No. 104-23, at 10 (1995).

[15] The accompanying Further Notice of Proposed Rule Making also seeks to add obstacles to forbearance requests.

[16] *Order*, ¶ 115. As GTE has pointed out in its comments in response to the *Notice of Proposed Rulemaking* accompanying the *Order*, "the FCC's examination of cost of compliance evidence is beyond the scope of its authority . . . . Nowhere does the statute provide that the FCC may consider the cost of compliance in determining whether to forbear." Comments of GTE, WT Dkt. No. 98-100, at 10 (filed Aug. 3, 1998).

[17] S. Rep. No. 104-23, at 10 (1995).

intrusion in markets, and inhibit the full blossoming of competition all in direct contravention to Congress' wishes."[18]

III. THE COMMISSION IGNORED THE EVIDENCE OF COMPETITION IN THE CMRS MARKET IN REVIEWING THE CONTINUING NEED FOR THE RESALE RULE

A. The Commission Has Found the CMRS Market To Be Highly Competitive

As the Commission has frequently noted, competition in the CMRS industry is robust. The *Third Annual CMRS Competition Report* documents the Commission's own findings about the level of competition in the mobile telephone market.[19] In 1996, domestic mobile telecommunications revenues accounted for nearly 12 percent of all domestic telecommunications revenues.[20] By the end of 1997, the mobile telephone market had over 55 million subscribers and total service revenue in 1997 was $27.5 billion.[21] These astounding numbers are due in part to entry by new wireless competitors such as broadband Personal Communications Services ("PCS") and digital Specialized Mobile Radio ("SMR") operators. The report identified at least three mobile telephone providers in each of the 50 largest Basic Trading Areas ("BTAs") and 97 of the 100 largest BTAs.[22] Approximately 273 BTAs have three

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18 *Separate Statement of Commissioner Michael Powell, Dissenting in Part*, at 3.

19 *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, FCC 98-91, at 14 (rel. June 11, 1998) (Third Report) ("*Third Annual CMRS Competition Report*").

20 *See id.* at 2.

21 *See id.* at 3.

22 *Id.*.

or more mobile telephone operators offering service.[23] These statistics illustrate how multiple service providers are operating in a highly competitive market.

One of the clearest indications of competition in the mobile telephone market is the resulting reduction in prices. The Commission believes that "prices have been falling and that the reductions are at least in part the result of entry by new competitors."[24] In markets where at least one PCS operator is providing service, the average combined rates for cellular and PCS are between 15 and 18 percent below the cellular rates in markets where no broadband PCS operator is competing.[25] In addition, PCS operators are setting their prices well below those of cellular operators in their markets.[26] In its *Third Annual CMRS Competition Report*, the Commission cited two studies that found PCS prices to be between 10 to 15 percent[27] and 17 to 20 percent below cellular prices.[28] Reports also indicate that prices for mobile telephone service have been decreasing over time, for example, dropping 25 percent between 1994 and early 1997.[29]

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[23] *See id.* at 18. Over one-half of these BTAs have three mobile telephone operators, 71 BTAs have four providers, 51 have five, and 13 have six. These 135 BTAs represent over 68 percent of the nation's POPs. *Third Annual CMRS Competition Report* at 18.

[24] *See id.* at 19. *See also id.* at 3 ("It appears from the data available that prices have been falling as competition has increased.").

[25] *See id.*

[26] *See id.* (citing The Yankee Group, *Competition Begins to Have an Impact on Wireless Pricing*, YankeeWatch: MobileFLASH, Apr. 18, 1997, at 1).

[27] *See id.*

[28] *See Third Annual CMRS Competition Report* at 19 (citing Perry D. Walter & Christopher E. Jefferson, *PCS Versus Cellular: A Quarterly Survey of Wireless Pricing in Markets Where PCS Operators Have Begun Service*, The Robinson-Humphrey Company, LLC, Jan. 9, 1997, at 2).

[29] See *Third Annual CMRS Competition Report* at 19-20 (citing The Yankee Group, *Competition Begins to Have an Impact on Wireless Pricing*, YankeeWatch: MobileFLASH, Apr. 18, 1997, at 3).

According to the *Third Annual CMRS Competition Report*, the Commission has found the CMRS market to be "an evolving and complex industry where new services using emerging technologies, which were not even envisioned only a few years ago, compete with existing products."[30] This competition is "having beneficial effects for consumers, to whom competition is bringing more choices at lower prices, and operators, to whom competition is bringing expanding business opportunities, increased technological innovation, and less regulatory intervention."[31] Indeed, even in the *Order*, the Commission acknowledges that the CMRS marketplace is "more competitive than most telecommunications markets."[32] The *Order* also observes that "substantial progress has been made towards a truly competitive mobile telephone marketplace, resulting in lower prices and more attractive service offerings for consumers."[33]

B. Specific Examples Illustrate the Beneficial Effects of CMRS Competition for Consumers

Not only has the Commission, in its *Third Annual CMRS Competition Report*, found the CMRS marketplace to be vigorously competitive, but there is ample empirical evidence verifying the level of competition and its benefits for the public. For example, pricing plans of four CMRS providers, CellularOne, BellAtlantic Mobile, Sprint PCS, and AT&T Wireless, highlight the existence of such competition. In particular, a review of the prices and service offerings of these providers demonstrates that: (1) carriers are not "locking in" customers with long term service

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30 *Id.* at 63.

31 *Id.*

32 *Order*, ¶ 8. In fact, the CMRS marketplace is clearly *the* most competitive telecommunications market.

33 *Id.*

contracts; (2) it is possible to obtain dial tone service at a bare bones price as well as a range of other service options; and (3) carriers offer unbundled phones and service.

These service providers also offer a wide variety of additional features, including answering machines, voicemail, numeric pagers, caller ID, call waiting, three-way calling, text messaging, and call forwarding. The price of these features (and whether they are offered at all) varies among service providers and by service (*i.e.*, digital services tend to be more feature-rich than analog services).

Regarding the length of service contracts, Table 1 indicates that no carrier requires a commitment of more than one year, and one carrier (Sprint PCS) has no minimum length of service. Similarly, the price of monthly service is also quite reasonable, ranging from $16.99 to $29.99, depending largely upon whether the customer prefers analog or digital service. Finally, there is a wide range of handsets available, each with different features at a different price, and none of which is tied to a particular service contract. Thus, the need to purchase a handset does not tie the customer to a particular carrier for a long term service contract.

Table 1: Broadband Wireless Services Available in the Washington, D.C. Area

Carrier	Minimum Length of Service	Minimum Price Per Month	Price of Phone
CellularOne (analog cellular)	1 year 2 years	$24.99 $16.99	$49.99 - $799.99
CellularOne (digital cellular)	1 year	$18.99	$89.99 - $169.99
BellAtlantic Mobile (analog cellular)	1 year	$19.99	$9.99 - $699.99
BellAtlantic Mobile (digital cellular)	1 year	$29.99	$129.99 - $179.99
Sprint PCS (PCS)	none	$16.99	$149.99 - $199.99
AT&T Wireless (PCS)	1 year	$24.99	$199.99 - $249.99

This survey of wireless providers offers tangible evidence of the salutary effects of competition on price and service. Table 1 confirms the Commission's conclusion that competition has driven down prices. Moreover, in order more effectively to meet customer needs and preferences, and thus thrive in the marketplace, competing providers offer a wide variety of digital and analog services. Finally, CMRS carriers vigorously compete against one another in their advertisements on all available media, including web pages.[34]

C. The *Order* Ignored, Without Any Justification, the Commission's Own Findings of CMRS Competition

The Commission's own findings about the level of CMRS competition undercut the agency's rationale for its refusal to grant forbearance from the resale requirements. In the *Order*, the Commission reasoned that "the operation of competitive market forces removes the opportunity and incentive for carriers to restrict resale in an anticompetitive manner."[35] As discussed above, the Commission has previously found the CMRS marketplace to be competitive. Instead of applying the Section 10 legal standards consistent with the competitive nature of the CMRS marketplace, the Commission dismissed its own findings and refused to grant forbearance from the resale requirements. The Commission's failure to accept its own previous findings of CMRS competition was in error, and the agency should grant reconsideration.

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[34] *See* Sprint Spectrum: Features and Benefits (visited Aug. 12, 1998) <http://www.sprintspectrum-apc.com/features.html> (stating "Integrated features make Sprint Spectrum superior to other wireless services,"); and <www.sprintspectrum-apc.com/cus_satis.html> (citing J.D. Power and Associates study finding that "[l]ess than two years after launching, Sprint Spectrum has earned the 'Highest Overall Customer Satisfaction' ranking among wireless users in the Washington-Baltimore area") (visited Aug. 12, 1998).

[35] *Order*, ¶ 38.

IV. FORBEARANCE FROM ENFORCEMENT OF THE CMRS RESALE RULE IS MANDATED BY SECTION 10

A. Forbearance from the Resale Rule for All Broadband CMRS Carriers Is Consistent with the Three Prongs of the Section 10 Test

Despite the showing made in the *Petition for Forbearance*, the strong record support, the Commission's own report, and significant procompetitive developments in the interim between the filing of PCIA's Petition and issuance of the Commission's decision, the Commission concluded in the *Order* that "the record does not show that the three-pronged forbearance test . . . has been met."[36] Accordingly, the Commission "decline[d] to forbear from enforcing the resale rule with respect to broadband PCS providers at this time."[37]

There is absolutely no evidence, under the first prong of Section 10, indicating that enforcement of the CMRS resale rule is necessary to ensure that CMRS charges, practices, classifications, or regulations are just and reasonable. The Commission nonetheless stated in its decision that, despite the level of competition in the CMRS marketplace, the competitive development is not "complete," and although increased competition brings numerous benefits to

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[36] *Id.*, ¶ 34.

[37] *Id.* Although PCIA initially sought forbearance specifically for broadband PCS providers, a number of parties commenting on PCIA's *Petition for Forbearance* urged the Commission to exercise its forbearance authority as applied to all affected broadband CMRS carriers. In its Reply, PCIA endorsed this approach and agreed that, to the extent that the Commission found the Section 10 test satisfied for other CMRS providers, forbearance should be extended to those operators as well. *See* Broadband Personal Communications Services Alliance of the Personal Communications Industry Association Reply To Comments on Petition for Forbearance, at 3-4 (filed July 17, 1997) ("*PCIA Forbearance Reply*"). Forbearance from enforcement of the resale rule as applied to all affected CMRS carriers is, therefore, an issue that has properly been presented to the Commission. PCIA submits that, in light of the competitive developments affecting the broadband CMRS industry as a whole, and in view of the fact that no broadband CMRS carrier has market power, forbearance is appropriate as applied to all broadband CMRS carriers.

consumers and eliminates the rationale for many regulatory requirements, one "cannot assume that increased competition alone will protect consumers from unjust or discriminatory practices."[38] The Commission also found that "the evidence does not establish that current market conditions will ensure that providers' practices are just, reasonable, and not unjustly or unreasonably discriminatory, and that consumers will not be harmed."[39]

On the contrary, experience shows that, in an industry as competitive as CMRS, unjust or unreasonable charges, practices, or classifications will not survive. Specifically, carriers engaging in such practices will not thrive because customers, including resellers, that are greeted by anticompetitive activities will go to another operator and obtain service at rates they consider just and reasonable.

Proving the future non-existence of unjust or unreasonable CMRS charges and practices is extremely difficult. The Commission's decision declining to forbear, however, fails the far easier task of establishing that the CMRS resale rule is needed to prevent anticompetitive conduct. Although the Commission cites practices alleged by WorldCom and Touch 1, and surveys conducted by the National Wireless Resellers Association ("NWRA") and the Telecommunications Resellers Association ("TRA"), as examples suggesting "abuses in the form of refusals to offer services for resale," the Commission admits that it "cannot conclude from this record that all of these alleged practices are unreasonable."[40] Somewhat surprisingly, the

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38 *Order*, ¶ 36.

39 *Id.*

40 *Id.*, ¶ 38.

Commission nevertheless goes on to state that these allegations "have not been effectively refuted."[41]

This is simply incorrect. Virtually every carrier alleged by WorldCom to have restricted or discouraged resale explained that WorldCom's allegations are without foundation or are based on a misunderstanding of the resale requirement.[42] The claims raised by Touch 1 — that carriers are "stalling reseller agreements, indicating that they are too busy building out their systems to get involved with reseller agreements," and that Touch 1 "has been presented with reseller rates so complicated that it would be almost impossible to craft a consumer rate plan from them or administer such rates in [Touch 1's] own billing system"[43] — are so vague and lacking in context that it is staggering for them to have been cited as evidence of anything.[44] Finally, PCIA has

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41 *Id.*

42 *See* Reply Comments of AT&T Wireless Services, Inc., at 2-3 n.5; Reply Comments of Sprint PCS and American Personal Communications, at 2-4; Reply Comments of PrimeCo Personal Communications, L.P., at 2-6. As explained by a number of these commenters, the resellers' comments evidenced a misunderstanding of the resale obligation by suggesting that any failure to develop wholesale resale policies or programs somehow constitutes a violation of the resale rule. It is well established that the resale rule does not require carriers "to structure their operations or offerings in any particular way, such as to promote resale, or adopt wholesale/retail business structures, or to establish a margin for resellers, or guarantee resellers a profit." *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services,* 11 FCC Rcd 18455, 18462 (1996), *recon. pending. See also Order,* ¶ 33.

43 *See* Letter from Michelle Van Pelt, President, Touch 1 Wireless, to William F. Caton, Secretary, Federal Communications Commission (dated July 16, 1997). It is disingenuous for the Commission to criticize a failure to respond to Touch 1's allegations, since they were not filed until the date when reply comments on PCIA's Petition were due.

44 Moreover, in a point relevant to claims raised by both WorldCom and Touch 1, PrimeCo correctly noted that carriers are not obligated to provide resellers with a specific form of billing tape in connection with any rate plan or service offering a reseller may desire. PrimeCo points out that billing services are not "communications services" or "common carrier services" and, therefore, are not regulated under Title II. *See* Reply Comments of PrimeCo Personal

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already demonstrated that the reseller surveys conducted by NWRA and TRA must be read for what they are: misleading inquiries designed to produce the answers NWRA and TRA desire.[45] These parties are simply gaming the regulatory process to gain a competitive advantage in the marketplace.

Thus, the analysis in the *Order* regarding the first prong of the Section 10 forbearance test is based on an erroneous reading of the record and an apparent disregard for evidence demonstrating that enforcement is not necessary to ensure just and reasonable charges, practices, or classifications.

Likewise, a proper assessment of the record and the current state of competition in the CMRS marketplace demonstrates that enforcement of the resale rule is not required for the protection of consumers.[46] Even fifteen months ago, when PCIA's Petition was filed, CMRS rates were declining in response to the introduction of new competitors, new participants were entering the market with ease, and existing and new operators had strong incentives to offer

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Communications, L.P., at 5 n.14; *see also Detariffing of Billing and Collection Services,* 102 FCC 2d 1150, *recon. denied.,* 1 FCC Rcd 445 (1986).

[45] *See PCIA Forbearance Reply* at 24-25; *see also* Letter from Jay Kitchen, President, PCIA, to The Honorable William E. Kennard, Chairman, Federal Communications Commission (dated March 11, 1998).

[46] In support of its decision, the Commission stated that resellers benefit the marketplace by: (1) focusing on residential and smaller consumers, giving them pricing and volume discounts and customer service that facilities-based carriers often make available only to larger customers; (2) exerting downward pressure on rates charged by facilities-based carriers through their ability to purchase service at high-volume rates and pass the savings on to residential and small business customers; (3) benefiting low-volume consumers through lower rates; (4) expanding opportunities for small businesses to participate in the communications marketplace by focusing on unserved or underserved market segments; and (5) offering customers a wider range of service packages. *Order*, ¶ 35.

innovative services. As discussed above, developments during the past year have led to an increased pool of CMRS competitors and to further reductions in mobile telephone prices. Finally, the Commission itself has found that mobile competitors have introduced a variety of innovative service and marketing packages tailored to differing customer segments as well as the particular geographic, pricing, and bundled service demands of consumers.[47]

These developments reflect that the market is producing all of the benefits that the Commission hopes to promote through continued enforcement of the CMRS resale rule.[48] There is simply no evidence that retention of the mandatory resale requirement is necessary to protect consumers.

The weight of the record also indicates that forbearance from enforcement of the CMRS resale rule is in the public interest. In the *Order*, the Commission concluded that the record "does not show forbearance from enforcement of the resale rule to be in the public interest."[49] The Commission premised this conclusion on its finding that "continued enforcement of the resale rule is important to promote the rapid development of vigorous competition in the market."[50] In addition, the Commission stated that "an active resale market can help to replicate many of the features of competition, including spurring innovation and discouraging unreasonably discriminatory practices, by increasing the number of entities offering service at the retail level."[51] Although the Commission agreed with PCIA that a mandatory federal resale

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47 *See Third Annual CMRS Competition Report* at 22-27.

48 *See Order*, ¶ 35.

49 *Id.*, ¶ 40.

50 *Id.*

51 *Id.*, ¶ 41.

requirement imposes costs on affected carriers, the Commission concluded that, "in the absence of specific evidence to the contrary, we cannot conclude that the administrative costs imposed by the resale rule outweigh the benefits of the rule."[52]

Here again, the benefits cited by the Commission occur in the marketplace wholly independent of an affirmative resale obligation. The Commission has not demonstrated any correlation between the CMRS resale rule and the reasons cited in support of the agency's determination that forbearance from enforcement of that requirement would not be in the public interest.

Indeed, the mere existence of the resale rule interferes with negotiation of contracts in the free market by preventing carriers from being able to enter into competitive contracts. As a result, carriers have simply chosen to refrain from making innovative pricing schemes available. This, in turn, increases costs to consumers by causing carriers to hold back from pursuing aggressive pricing, distribution channel, and other marketing strategies. In addition, the CMRS resale rule has increased costs to carriers and consumers because many resellers believe that the rule obligates facilities-based carriers to offer service at wholesale rates, or otherwise claim that a carrier's refusal or inability to structure its offering precisely as the reseller requests constitutes a

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[52] *Id.*, ¶ 42. In its Petition for Forbearance, PCIA discussed in detail the fact that, although the mandatory CMRS resale rule produces no actual benefit, the rule does create significant costs for CMRS operators and their customers. Costs documented by PCIA include: (1) substantial legal and administrative costs implicated by the need to review each contract for compliance with federal resale obligations and litigate resultant disputes; (2) costs to consumers as a result of deterred aggressive pricing practices, constrained volume pricing techniques, and thwarted innovative offerings; (3) costs to consumers as a result of discouraged marketplace negotiations; and (4) costs associated with disputes arising out of carriers' efforts to negotiate resale contracts that take into account the considerable expense of modifying end-user units and billing systems, among other things. *See Petition for Forbearance* at 36-37.

violation of the resale rule.[53] This tendency to misconstrue the requirements of the rule has resulted in substantial legal and compliance costs.

B. PCIA Is Not Opposed to Resale *Per Se*, Only to Mandated Resale

As outlined in its reply comments, PCIA does not oppose resale *per se*, nor is it seeking to eliminate the existence of a resale market. Quite to the contrary, PCIA has every reason to expect CMRS resellers to succeed as a natural and essential component of the distribution chain in much the same way that paging resellers have become successful participants in the paging marketplace without federal regulatory intervention.[54] PCIA's Forbearance Petition simply argues that the mandatory CMRS resale rule serves no valid purpose while imposing burdensome costs on affected carriers and consumers.[55]

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[53] For example, TRA maintained that its 1997 Year End Survey of Wireless Resellers demonstrated that resellers were unable to obtain PCS and SMR service because some PCS or SMR carriers "did not offer a resale agreement." As pointed out by PCIA in its *ex parte* letter responding to the TRA survey, however, not offering a resale agreement is not at all akin to refusing a request for resale. There are many legitimate reasons why a PCS or SMR carrier may not have on hand an agreement specifically tailored to resale, including that the underlying facilities were not up and running or that the PCS or SMR carrier offered its existing comparable business-to-business rate as opposed to a standard resale agreement. These are perfectly reasonable, legal explanations that in no way evidence unreasonable discrimination against resellers nor are they indicative of a refusal to offer service to resellers.

[54] *See PCIA Forbearance Reply* at 23.

[55] *See id.* at 20 ("[T]he level of competition in the CMRS industry and the fact that broadband PCS operators have extensive system capacity and high spectrum acquisition costs are marketplace characteristics that, in and of themselves, will bring about benefits that might result from a mandatory resale rule (*e.g.*, ease of entry by new participants, expanded consumer choices, competitive pricing, nondiscriminatory practices, innovative and efficient deployment and use of telecommunications facilities, effective carrier management and marketing, and market growth). Thus there is no need for the Commission to enforce the mandatory resale requirement.").

Significantly, there is no evidence in the record, nor is there any indication in the Commission's decision, that resale will be eliminated if the Commission forbears from mandatory CMRS resale. The Commission's entire rationale in allowing the rule to sunset undercuts any suggestion to this effect. Moreover, history and experience have shown that, in markets bearing the competitive characteristics of the CMRS marketplace, resale will flourish as a natural by-product of carriers' efforts to maximize revenues through increased distribution and growth of their offerings.

C. The Alleged Benefits of Retaining a Mandatory Federal Resale Requirement Have Not Been Factually Documented

Although the Commission cites several alleged benefits brought to the marketplace by resellers, neither the Commission nor any other parties document any benefits produced by the existence of a mandatory resale requirement.[56] Perhaps the most cited benefit in the *Order* is the assertion that resale promotes the provision of service to unserved or underserved communities.[57] Neither the record nor the Commission's decision, however, provides any basis for concluding that the CMRS resale rule is necessary to extend service to unserved or underserved market segments. In a competitive market, a facilities-based carrier will have every incentive to promote the distribution of its services to these communities and, indeed, will be as likely as a reseller to serve these communities directly. In fact, if the service is available for resale, the underlying facilities have to be in place. This being the case, it is difficult to imagine any reason why a facilities-based CMRS operators would be less inclined than a reseller to serve what the

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[56] *See Order*, ¶¶ 35, 39-41.

[57] *Id.*, ¶ 35.

Commission characterizes as underserved or unserved market communities or, absent the resale rule, would restrict resale in such areas.

Likewise, there is no factual support for the Commission's assertion that resellers "benefit the marketplace by focusing on residential and smaller business customers, giving them pricing and volume discounts and customer service that facilities-based carriers often make available only to larger customers,"[58] nor again, does the Commission explain how the resale rule promotes this alleged benefit. It is simply not true that resellers are any more likely than facilities-based carriers to serve residential and small business customers.

Finally, given the well-documented downward trend that the introduction of new PCS competitors has exerted on prices charged by CMRS carriers, it is doubtful that resellers will place any separate pressure on prices. Indeed, the Commission's claim that resellers exert downward pressure on the rates charged by facilities-based CMRS carriers is unsupported by any data or by economic theory. Furthermore, resellers are not cited in the *Third Annual CMRS Competition Report* as a force in the reduction of CMRS prices nor, for that matter, are they cited as producing any other significant competitive or other marketplace benefit.[59]

In summary, the Commission must reconsider that portion of its decision declining to forbear from enforcement of the CMRS resale rule. Proper application of the Section 10 test in a manner consistent with Congress' intent ably demonstrates that the CMRS resale rule is precisely the sort of unwarranted regulatory requirement that Congress intended for the Commission to forbear from in adopting Section 10.

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58 *See id.*

59 *See Third Annual CMRS Competition Report* at 14-38.